No. 14573

IN THE

# United States Court of Appeals

## For the Ninth Circuit

ELI B. CASTLEMAN, MARION V. CASTLEMAN, LOUIS FEUERMAN, JULIUS NOVEMBER, ELEANOR NOVEMBER, and BERNARD REICH,

*Appellants,*

vs.

HOWARD R. HUGHES, RKO PICTURES CORPORATION, RKO RADIO PICTURES, INC., THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, ELI B. CASTLEMAN, MARION V. CASTLEMAN and LOUIS FEUERMAN,

*Appellees.*

## BRIEF OF CASTLEMAN AND FEUERMAN DESIGNATED HEREIN AS APPELLANTS AND AS APPELLEES


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## BRIEF OF CASTLEMAN AND FEUERMAN DESIGNATED HEREIN AS APPELLANTS AND AS APPELLEES

### Statement of the Pleadings and of Facts Relative to Jurisdiction of the District Court and of Facts Disclosing That This Court Has *No* Jurisdiction to Review the Judgment in Question

On December 15, 1952 (R. 320) Eli B. Castleman, Marion V. Castleman (hereinafter sometimes, the Castlemans) and Louis Feuerman commenced an action in the Court below.

On August 5, 1954 Hon. Ben Harrison, District Judge, granted the motion of RKO Radio Pictures, Inc. to dismiss said action, with prejudice, in accordance with his "Memorandum" filed (said) day (R. 355, 356), and concurrently denied two fee applications by Mr. Reich.

After providing for a hearing on the proposed Final Judgment (R. 357) it was docketed on September 27, 1954 (R. 360-362).

Mr. Reich prepared, signed and served a Notice of Appeal dated October 1, 1954 which was filed October 4, 1954 (R. 362).

Mr. Reich at the same time, unilaterally and extra-judicially has grafted on to the title of the action below the names of three persons as *parties "Appellants" in addition* to the names of the three existing plaintiffs. These three *new* "parties" are Julius and Eleanor November and *Mr. Reich himself.* In the body of the Notice of Appeal, Mr. Reich states over his own signature (R. 362) that said three original (and sole *party*-) plaintiffs " * * * hereby appeal * * * from the * * * Final Judgment entered in this action on September 27, 1954," as do the Novembers and he, himself.

As to the Castlemans and Feuerman, said Notice of Appeal at the time of its making, serving and filing (and now) did not reflect the truth. The Castlemans and Feuerman are *not* appealing from the Final Judgment below.

In his Opening Brief, Mr. Reich has *now* " * * * admitted that the appeal herein *was taken without the consent of the appellants* Castleman and Feuerman, * * *". He, therefore, no doubt, feels called upon to offer "some explanation of why counsel has designated himself as the attorney for the appellants, including *three who have not authorized him to take the appeal*" (Reich brief, p. 3) (italics supplied).

With the Castlemans and Feuerman out of the appeal on "admitted" facts; with no true "party" to the record properly before this Court as an aggrieved appellant, it is respectfully submitted that this Court has no jurisdiction to review the judgment in question.

## Statement of the Case

Mr. Reich's "Concise Statement of the Case" as well as his "Detailed Statement of the Case" are controverted; hence this separate "Statement".

"This case is one of several shareholders' derivative actions filed in both state and federal courts throughout the United States involving alleged injury to the same corporation at the hands of the same corporate officers". Thus wrote Judge Ben Harrison in opening his "Memorandum Granting Motion to Dismiss" (R. 356).

On a chronological basis there can be no possible contradiction of the fact that of their four (4) several actions the Castlemans and Feuerman had commenced their actions *first in New York* (R. 97, 100, 154). (Moreover, the interest of Messrs. Kipnis and Mittelman "* * * in the RKO situation goes back to a period late in 1949 when (they) were first consulted by a client who was dissatisfied at the way in which Hughes was acting relative to RKO".) In any event, they started suit in New York on the day after the sale of the Hughes control-stock in September, 1952 (R. 153). *The New York action preceded the California action by three months.*

A second New York action, which *also preceded the California action,* by more than a month, was commenced with a concurrent application for the appointment of a receiver of RKO's New York assets (R. 153).

Widespread publicity attended the receivership application (R. 153) at the time of its making and for some time thereafter. Nevertheless, no other actions by other RKO shareholders were commenced anywhere before April 20th (R. 218) in California.

While the receivership application was pending, Mr. Kipnis was "looking for an RKO savior" (R. 155). He

wrote to the three persons he thought might be able to save the Company; Charles Allen (a Wall Street investment banker), Louis B. Mayer and Floyd Odlum. Mr. Allen sent back word that he would "not touch RKO with a ten-foot pole"; Mr. Mayer did not even respond, but Mr. Odlum, whose Atlas Corp. was the largest RKO shareholder, offered "to listen" (R. 154).

All of this took place *before* Mr. Reich was asked to act as local counsel for a "stand-by" action (R. 154) in California.

At Mr. Odlum's invitation, Mr. Kipnis met with Mr. Slack (Mr. Hughes' lawyer) at Indio, California (R. 155, 320). At that time it was still not possible to obtain personal jurisdiction over Mr. Hughes in New York (R. 319).

Mr. Slack at that meeting had stated that plaintiffs were free to sue in any State, including California, but added that Mr. Hughes would contest jurisdiction if any such action were prosecuted elsewhere than Nevada (R. 321), Mr. Hughes' intended and then actual residence (R. 155). There, he would appear (R. 155, 321) if sued. No other agreement of any kind or nature was made (R. 156).

An examination into the facts by Mr. Kipnis after the Indio meeting disclosed the following facts and advantageous factors in favor of Nevada as the forum for the derivative action (R. 321):

1. It had adopted the Federal Rules of Civil Procedure with its wide examination provisions;
2. Jurisdiction over the person of Hughes, the principal, financially responsible defendant, when obtained, would be irrevocable;
3. There was no "security-for-costs" bond requirement (contra in New York and in California);
4. The calendar docket was reasonably current;

5. Avoidance of dilatory contests as to residence, service, venue, as envisaged in California, was certain (R. 293).

But first and foremost there was established to Mr. Kipnis' satisfaction the fact of Mr. Hughes' actuality of residence in Nevada (R. 321).

The Nevada action was thereupon commenced (R. 322) on December 23, 1952 (R. 184).

It received widespread publicity (R. 322) and aroused the ire of Mr. Reich (R. 322), "who, apparently, saw vanishing from his grasp that which he had planned to take for himself, to wit, control of this action under the belief that this case would necessarily be tried in this Court, in consequence of which he would expect more than 10%" (R. 322).

Upon being advised of the commencement of the Nevada action, Mr. Reich first attempted to persuade New York counsel that their judgment was bad. He importuned them to make use of allegedly important factual information which he alone allegedly possessed. *He pleaded to be named as co-counsel in Nevada.* He intimated that the Nevada action could be misconstrued. He foretold that charges of fraud and collusion would be made (R. 322) but not by whom they were to be made.

In the meantime, with jurisdiction over Hughes and the other defendants irrevocably established in Nevada, the Castlemans proceeded diligently to prosecute said action (R. 225, 323) there.

On the other side of the Nevada boundary line, however, Mr. Reich plotted his subversion of the Nevada litigation. Preliminarily, he "* * * insisted upon attempting to establish that Hughes was a resident of California rather than Nevada for no other reason than that it would possibly

establish control of the case in his hands with possible financial benefits to himself'' (R. 322). *Mr. Reich made a first attempt to serve Mr. Hughes in the California action three months after the commencement of the Nevada action and its diligent prosecution* (R. 46, 138).

Without any notice, authority or warning and *before* any defendant in the California action had taken any procedural step, Mr. Reich served notice to take the deposition of Mr. Hughes at a time and place *in conflict* with a prior notice for such examination served out of the Nevada action (R. 139, 143; Stipulation, R. 37). This unauthorized and disruptive overt act, among others, by Mr. Reich, led ultimately to his discharge on May 7, 1953 as local counsel for the Castlemans (R. 322-323, 327).

Whereas the discharge of Mr. Reich (R. 157) was immediately effective as a matter of law, his substitution unfortunately, could not be immediately or simultaneously implemented and because of this lack, Mr. Reich sought to justify the vast volume of post-discharge collateral activity (R. 277), with the Castlemans as captive-plaintiffs, by his own, self-serving interpretation of the local Court Rules. Among his post-discharge activities were motions for a special master (R. 91); for setting aside order quashing service on Hughes and dismissing action (R. 134); to permit intervention (R. 175) and to set aside notice to take depositions of newspaper reporters.

Negotiations to substitute Mr. Reich out of the case were initiated (R. 52) following his suggestion therefor (R. 141). On April 16, forms of stipulation signed by all parties concerned (except Mr. Reich) were dispatched to him for execution (R. 161). They were never signed by Mr. Reich.

Mr. Reich was constantly shifting his ground regarding the nature of his status in the case by reason of his refusal

to sign the stipulation (already signed by all the other necessary parties). For example:

> "The fact is that I am still attorney of record and have not been effectively discharged" (R. 277);
>
> "I consider myself wrongfully discharged and entitled to insist on a fixed fee" (R. 166);
>
> "True you attempt to fire me" (R. 163);
>
> "* * * In the first place they had already discharged me * * *" (R. 277);
>
> "* * * after my so-called discharge" (R. 277);
>
> "With respect to the issue of my wrongful discharge" (R. 270);
>
> "Since by wrongfully discharging me" (R. 280).

(Later it was necessary to move to enjoin Mr. Reich from acting and representing himself as alleged counsel for the Castlemans (R. 74, 75) but since the motion was not acted upon, Mr. Reich continued, without any authority, to describe himself as "attorney for plaintiffs".)

Because two motions were then pending and stipulations adjourning them were required to be signed, Mr. Reich, though *functus officio* (R. 120), was requested by New York counsel (R. 165) if he were not yet "*formally substituted*" to sign them; on the other hand, if the substitution were then effective, then new counsel was to sign (R. 166). Said new counsel was the late Henry Herzbrun (now succeeded by Messrs. Silver and DeGroot, his office associates (R. 323).

In addition to adjourning the proposed deposition of Mr. Hughes and adjourning RKO's motion for security for costs, said stipulation of May 22, 1953 (R. 38) provided in part, that:

> "* * * prosecution of this action shall be stayed until ten (10) days after the motion for security for expenses has been disposed of and that the time of RKO Radio Pictures, Inc. to answer or move with respect to the complaint herein be and the same is hereby extended until ten (10) days after such motion has been disposed of."

Every single bit of work done by Mr. Reich after May 7, 1953, when he was fired for cause (R. 327), described in his two fee applications, was self-generated, voluntary work (R. 335, 339, 378). Moreover, it was not only contrary to the wishes and without the approval of the plaintiffs (R. 327) but also in direct contravention of the stipulation of May 22, 1953 (R. 37-38).

These post-discharge activities by Mr. Reich, moreover, interfered with the effective and sustained prosecution of Mr. Hughes in the Nevada court first by compelling Messrs. Kipnis and Mittelman to dispel, with detailed documentation, the aura of suspicion cast over the case by Mr. Reich and by diverting their efforts with side issues calculated to bring newspaper publicity to Mr. Reich (Reich motions, *passim,* R. 330).

In still another way the activities of Mr. Reich served also to delay the Nevada case in that the publicity which Mr. Reich sought and obtained for his post-discharge activities stimulated a transcontinental competitive action in New York out of which the delay originated (R. 187, 224). Despite the handicaps interposed by Mr. Reich, Messrs. Kipnis and Mittelman were able nevertheless to bring the Neveda case to the point of imminence of trial with a record of pre-trial discovery, inspection and examination of a most intensive and extensive nature (R. 224).

On the eve of trial and without any notice or knowledge by anyone of Mr. Hughes' intention, he made an offer "* * *

to purchase from RKO Pictures Corporation all of its assets as of the date of transfer to me, including any and all claims or causes of action of every kind or character against or which might be asserted against, any person or persons, including me'' (R. 195, 324).

Certain conditions were attached to the offer (R. 188, 196).

On February 11, 1954, Mr. Hughes moved in the Nevada action ''* * * to dismiss with prejudice the action against all defendants * * *'' (R. 188, 200). On the same day, the Nevada Court fixed March 22, 1954 as the date for hearing said motion and directed RKO to give notice thereof to each of its stockholders by mailing a copy thereof to each such stockholder with a proxy statement (required by the U. S. Securities and Exchange Commission) relating to the Special Meeting of stockholders scheduled for March 18th for the purpose of acting upon Mr. Hughes' aforesaid offer (R. 189, 202), which RKO did.

(But on February 16, 1954 other alleged shareholders of RKO Pictures Corp. sued in the Chancery Court of Delaware for an injunction against proceeding with the sale of its assets to Mr. Hughes because the offer was ''grossly inadequate'' (R. 193). A trial was had resulting in a judgment on the merits in favor of RKO and certified copies of the relevant documents were submitted to the Court below (R. 194).)

The point had been raised in Delaware that Mr. Hughes' purchase of RKO's assets encompassed the so-called ''waste'' actions. The Chancellor took cognizance thereof but disposed of it thus:

> ''* * * Conceding that Hughes, by his offer, will bypass the impending derivative waste actions against him, that consequence does not condemn the transaction. It is not uncommon for corporate execu-

> tives to attempt to clean the litigation slate in one fell swoop in order to be done with it." *Schiff* v. *RKO Pictures Corporation,* 104 A. 2d 267, at 281 (1954).

On the return day of the motion in Nevada to dismiss said action with prejudice, the parties plaintiff and defendant and counsel for Julius and Eleanor November and others not identified (R. 189) appeared and participated at the hearing.

The Castleman plaintiffs had, in the meantime, cross-moved for an order assessing upon RKO Pictures Corporation and RKO Radio Pictures, Inc. their reasonable expenses (including attorneys' fees and accountant's fees), incurred in the prosecution of the claims and causes of action encompassed among the assets contemplated to be sold by said corporations to Mr. Hughes, as a condition to the approval, by the Nevada Court, under Rule 23 (c) of Mr. Hughes' motion to dismiss the action with prejudice (R. 190, 213).

Before considering the cross-motion of the Castlemans, however, the Nevada Court adjourned the same and required of RKO (R. 213) that notice be given to *all* plaintiffs in *all* representative and derivative actions, *wherever pending,* purporting to be brought on behalf of RKO or its stockholders, by notice to *all* counsel who have appeared for any such stockholders, directing such plaintiffs to show before the Nevada Court on April 5, 1954, any claims they may have for reimbursement of expenses, if any, including attorneys' fees, if any, incident to any such action (R. 194).

Mr. Reich had previously communicated with the Nevada Court (R. 99) having sent to it copies of affidavits and other documents calling for an investigation of "the circumstances surrounding the submission by the parties to the jurisdiction of your Court" (R. 104). Other communica-

tions by Mr. Reich to the Nevada Court raised other points which were critical of the parties (R. 108, 113) and the action.

When, on March 30, 1954 (R. 214) Hon. Frank McNamee, Nevada District Judge, made his Findings of Fact and Conclusions of Law, he adverted to those very matters. In Paragraph 38 (R. 223) the Court recorded that the charges of "collusion", lack of "truly adversary" proceedings and "inadequate" representation "have been specifically denied by everyone whose activities have been impugned thereby" and that he had reviewed the material at hand. Paragraph 39 (R. 225) found as a fact and concluded as a matter of law *"that this (Nevada) Court's jurisdiction is not a product of collusion of any type; that Howard R. Hughes resides and is domiciled in Nevada; that this action is, and has been conducted as a truly adversary proceeding; that plaintiffs have prosecuted this action diligently; that the stockholders of RKO have been fully and adequately represented by plaintiffs; and that the judgment dismissing this action with prejudice is binding upon all other stockholders of RKO"* (R. 225). (Emphasis supplied.)

Thereupon, the Nevada Court, on April 1, 1954, entered its Final Judgment dismissing the Castleman-Nevada action with prejudice (R. 193).

Jurisdiction was reserved for the purpose of determining and allocating all fees and costs (R. 193). Notice, as directed to be given by the Nevada Court to *all* plaintiffs, by notice to *all* counsel who had appeared for any such stockholders was so given by RKO. The "notice" to all counsel included Mr. Reich and, in addition, Mr. Kipnis gave Mr. Reich separate individual notice (R. 325).

On April 5, 1954, a Final Order allocating fees was made. Paragraph 10 thereof (R. 239) recites that:

> "* * * there has been no showing by any stockholder (*other than plaintiffs herein*) or any attorneys (*other*

> *than attorneys for plaintiffs herein*) that any such stockholder or attorney has conferred any benefit on RKO Pictures Corporation or RKO Radio Pictures, Inc., or contributed in any degree to any such benefit, by reason of the various stockholders' derivative and representative actions elsewhere instituted; * * * and there has been no showing that any stockholder, attorney or other person is entitled to recover any amount from the sum now within the jurisdiction of this Court." (emphasis supplied.)

There is no question at all that in sufficient time before April 5, 1954 Mr. Reich did in fact receive (R. 260) not only the Court notice as to the fee hearings, from RKO but also the specific notice from Mr. Kipnis (R. 325). To use his words (R. 259) "The fact is that I received a notice of motion inviting me to come to Las Vegas and make application for fees." He refused to be "lured" (R. 251) into Las Vegas on the issue of counsel fees.

Following the entry of Final Judgment in the Castleman-Nevada action, defendant RKO Radio Pictures, Inc. moved to dismiss the California action, with prejudice (R. 184). Said motion was supported by an affidavit from Mr. Roy W. McDonald (R. 186). The thrust of the motion and supporting affidavit was that: "5. The final order of dismissal with prejudice duly entered by the Nevada Court on April 1, 1954, bars any further prosecution of this action" (R. 185).

In addition to Mr. McDonald's affidavit the Court below also had before it certified copies of the proceedings in the Nevada and Delaware actions (R. 185, 194).

Said motion to dismiss the California action with prejudice came on to be heard on July 12, 1954, at which time Mr. Reich opposed the same, presented other motions for consideration plus two motions for fees for himself (R. 351-352).

On August 5, 1954, Hon. Ben Harrison filed his "Memorandum Granting Motion to Dismiss" (R. 356-357) which incorporated a denial of Mr. Reich's two fee applications, and on September 27th made and entered a final judgment (R. 360-361).

On October 4, 1954, Mr. Reich filed the notice of appeal (R. 362) herein.

## Preliminary Discussion with Respect to the Use of Words of Art in the Brief of the Castlemans and Feuerman

In his Opening Brief Mr. Reich has employed words of art, having fixed meanings, but he has used them without that degree of precision which would permit the use of the same words of art by the Castlemans and Feuerman without the preliminary clarification which follows.

It is with all due deference to this Honorable Court that its time is presumed upon to discuss legal expressions but unless it is done the risk is run of not communicating to this Court the *ideas* which only *words* can convey.

For example, Mr. Reich has referred to "class actions" without differentiating them in accordance with the distinctions contained in Rule 23 of the Federal Rules of Civil Procedure; he has interchangeably employed the descriptive words "representative" and "derivative" insofar as actions by security holders are concerned; he has failed to distinguish between "direct" and "indirect" attacks on judgments; between intervention as a matter of right and as a matter of discretion; he has failed to distinguish between "corporate rights" and "individual rights" in the relation between a stockholder and his corporation, and, he has not indicated a recognition of the areas of judicial discretion without which only a mechanistic approach to the judicial process would be available.

nor has he made clear his use of the word "jurisdiction", "collusion" and "defense". In order to keep this brief within reasonable limits, there shall be submitted one citation, whenever possible, for each term used by the Castlemans and Feuerman in order to indicate to this Court the sense in which it is being used herein.

**Stockholder Actions: Representative and Derivative.**

In *Koster* v. *Lumberman's Mutual Casualty Co.*, 330 U. S. 518, 91 L. ed. 1067 (1947), these actions have been described as:

> "* * * an invention of equity to supply the want of an adequate remedy at law to redress breaches of fiduciary duty by corporate managers. Usually the wrongdoing officers also possess the control which enables them to suppress any effort by the corporate entity to remedy such wrongs. Equity therefore traditionally entertains the *derivative or secondary* action by which a single stockholder may sue in the corporation's right when he shows that the corporation on proper demand has refused to pursue a remedy, or shows facts that demonstrate the futility of such a request * * *
>
> "*The cause of action* which such a plaintiff brings before the court *is not his own but the corporation's. It is the real party in interest* and he is allowed to act in protection of its interest somewhat as a 'next friend' might do for an individual, because it is disabled from protecting itself." (emphasis supplied.)

And in *Schreiber* v. *Butte Cooper & Zinc Co.*, 98 F. Supp. 106 (1951), the distinction was pointed up and further refined. At page 113 Judge Weinfeld wrote:

> "An action may be said to be *representative* when it is based upon a *primary or personal right belong-*

> *ing to the plaintiff-stockholder* and those of his class. It is *derivative* when the action is based upon a *primary right of the corporation* but which is asserted on its behalf by the stockholder because of the corporation's failure, deliberate or otherwise, to act upon the primary right. 'The cause of action which such a plaintiff brings before the court is not his own but the corporations. It is the real party in interest * * *'. Thus, we must determine whether the right of action exists in the plaintiff—as a primary right—or whether it is derived from the corporation or secondarily because of its failure to act. * * * '' (emphasis supplied.)

**Class Actions and Rule 23.**

Judge Weinfeld's exegesis in *Schreiber, supra,* is a clear recognition of the various types of class actions referred to in Rule 23. The Rule speaks of ''the character of the right sought to be enforced''. The disjunctive ''or'' is referred to in subdivision (a)(1) thus:

> ''joint, *or* common, *or* secondary in the sense that the owner of a primary right refuses to enforce that right * * *''

Since we are concerned here with a stockholder's action the ''secondary'' type of action above-referred to is material. Which in turn calls into play subdivision (b) relating to ''Secondary Actions by Shareholders''. Historically this is Equity Rule 27 with modifications and is expressive of the holding in *Hawes* v. *Oakland,* 104 U. S. 450 (1882), and former Equity Rule 94.

Subdivision (c) of Rule 23 deals with ''Dismissal or Compromise''.

Rule 23 (c) is expressly stated to be an exception to Federal Rule 41 (a), which provides for voluntary dis-

missal of suits simply by the filing of a stipulation of dismissal and without requiring an order of court. A plaintiff in a stockholder's suit, however, while he has the right to institute the action and control over its prosecution, being a class action, he cannot prejudice the rights of the class which he assumes to represent by filing a stipulation to dismiss.

The notes of the United States Supreme Court's Advisory Committee on Rules for Civil Procedure make express reference to McLaughlin, "Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit," 46 Yale Law Journal 421 (1936). This article, oft-quoted and frequently used as authority, explains the reasons for restricting the suing stockholder's right to "terminate" a derivative action.

Professor McLaughlin states (*id.*, p. 426):

> "Generally speaking a stockholder-plaintiff can prejudice the cause of action in two ways: one by discontinuing the suit, and second by compromising the suit and obtaining the entry of a consent judgment. The discontinuance may result in the surrender of an advantage already gained in the litigation, or even if ostensibly effected without prejudice may subject the cause of action to the statute of limitations. Compromising a suit and entering a consent judgment, in the absence of a showing of fraud or collusion, destroys a right of action."

This direct reference by the Committee points inescapably to the conclusion that Rule 23 (c) uses the words "dismissed or compromised" solely in the sense of *terminating* the action. Since the rule peremptorily requires court approval before such an action can be dismissed, its purpose is completely served by the control of the Court over the attempt unilaterally to dismiss.

A number of cases have been decided by the Federal Courts in which it is recognized that the purpose and intent of Rule 23 (c) is to prevent a *termination of* a class action which would affect the interests of other members of the class without the safeguards of judicial examination and approval.

In *Winkelman* v. *General Motors Corporation* (D. C., S. D. N. Y. 1942), 48 F. Supp. 490, 493, the Court said:

> "In other words, the rule was adopted to secure not routine approval of a consent decree, but in order to insure supervision of the court for the protection of the corporation and all the stockholders. Cf. *McLaughlin*, op. cit. supra."

To the same effect, see also:

*Malcolm* v. *Cities Service Co.* (D. C. Del.), 2 F. R. D. 405, 407;
*Craftsman Finance & Mortgage Co.* v. *Brown* (D. C., S. D. N. Y. 1945), 64 F. Supp. 168, 177;
*Webster Eisenlohr, Inc.* v. *Kalodner*, 145 F. 2d 316 (C. C. A. 3 1944), cert. den. 325 U. S. 867;
*Pelelas* v. *Caterpillar Tractor Co.*, 113 F. 2d 629 (C. C. A. 7 1940), cert. den. 311 U. S. 700.

In the exercise of its power to enter an order dismissing an action with prejudice upon a speaking motion, the Court, to effectuate the purpose of the rule, will scrutinize it with great care. In this task the Court will apply, of course, appropriate principles of substantive law.

**Judicial Discretion.**

In the Ninth Circuit there is available a relatively short and clear exposition of what is meant by (judicial) discretion. In *Delno* v. *Market, St. Rway Co.*, 124 F. 2 965 (1942), the Court defined the term, at page 967, thus:

"In a second sense, and the one most commonly meant in the use of the word in the law, 'discretion' is defined as: 'The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the Court'. 1 Bouv. Law Dict., Rawles' Third Revision p. 884. Judicial action—discretionary in that sense—is said to be final and cannot be set aside on appeal except when there is an abuse of discretion. A common example is a court's ruling on the extent of cross-examination. Alford v. United States, 282 U. S. 687, 694, 51 S. Ct. 218, 75 L. ed. 624. *Discretion* in this sense, *is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court.* If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." (emphasis supplied.)

**Intervention.**

Rule 24 R. F. C. P. is not a self-executing rule. Whether intervention is sought as a matter of right (subdiv. a) or by permission (subdiv. b) a specific procedure is provided for by said Rule (subdiv. c). A motion is necessary; grounds therefor shall be stated; a pleading shall accompany the motion.

While there is some inter-circuit conflict on appealability from intervention orders there is none on the proposed intervener's requirement to comply with Rule 24 prior to favorable judicial action thereon. *Tachna* v. *Insuranshares Corp. of Delaware*, 25 F. Supp. 541, at 542, held "there is here no absolute right of intervention."

In one of the series of *Mullins* cases the matter of intervention was discussed broadly in *Mullins* v. *DeSoto Securities Co.*, 2 F. R. D. 502, where at page 508 the Court wrote:

> "Frankly, in the exercise of our delegated discretion, even if there were grounds for an intervention of right, we do not believe the motion to intervene is 'upon timely application'. 'Courts are unanimous in requiring prompt action on the part of an intervenor who seeks to assert rights in a suit to which he is not a party.' United States v. Columbia Gas & Electric Corporation, D. C., 27 F. Supp. 116, 119. 'The rule is silent as to what constitutes timely application and the question must therefore be answered in each case by the exercise of sound discretion by a trial court.' Simms v. Andrews, 10 Cir., 118 F. 2d 803, 806. See, also, Tachna v. Insuranshares Corporation of Delaware, D. C., 25 F. Supp. 541; White v. Hanson, 10 Cir., 126 F. 2d 559; American Brake Shoe & Foundry Co. v. Interborough R. T. Co., 2 Cir., 112 F. 2d 559.
>
> "We cannot grant the intervention of right, and it is denied."

In *Bernstein* v. *N. V. Nederlandsche-Amerikanische Stoomvaartmatchappij, etc.*, 76 F. Supp. 335, Judge Ryan at 349 wrote:

> "To permit permissive intervention, even though a common question of law and act is presented, the intervenor must present 'a claim in addition to the issues of the main suit.' Per Conger, J. in Kind v. Markham, D. C., 7 F. R. D. 265, 266."

In *Bachrach* v. *General Inv. Corporation*, 29 F. Supp. 966, at page 968, we have more judicial expression confirm-

ing that intervention is not only not had for the mere asking but requires timely, affirmative and correct conduct and procedure.

> "The decisions cited by the applicants with regard to the necessity of demand as a condition precedent to intervention are state court decisions. In the federal courts, the rules governing stockholders actions and intervention differ from similar actions in the state courts. I think it is properly urged that under our decisions and under the new Federal Rules of Civil Procedure, not only is a demand necessary prior to intervention with the same force as if the intervention was an independent suit, but under the present rules the application to intervene is defective if unaccompanied by a proposed pleading. Such proposed pleading is absent in the instant case.
>
> So upon these grounds and upon the undue delay in making this application short of the trial itself which is scheduled for October of this year, the court is constrained to deny the application as a matter of discretion."

**Jurisdiction—Collusion: Forum—Venue.**

In *Nierbo* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 84 L. ed. 167 (1939), Mr. Justice Frankfurter, writing for the Court, at page 170, said:

> "The jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of the litigants to confer. But the locality of a lawsuit—the place where judicial authority may be exercised—though defined by legislation relates to the convenience of litigants and as such is subject to their disposition."

In *Kentucky Natural Gas Corporation* v. *Duggins*, 165 F. 2d 1011, 1014, the Court touched upon each of the words-of-art of this subdivision thus:

> "Before discussing what we consider the real issue in the case, we may state that we do not agree with one of the contentions of appellants that the District Court lacked jurisdiction because of collusion between the plaintiff and intervening petitioners below in seeking jurisdiction. The refusal of the plaintiff's attorney to represent any of the heirs of Delia Spencer except the plaintiff, C. H. Duggins, in order to be able to bring his action in the Federal District Court, if such is the case, is not collusion as the term is generally used and understood. The plaintiff had the right to prefer to take his litigation into the Federal Court, instead of proceeding in one of the courts of the State, if the facts were not feigned or made merely colorable for that purpose. Nor does the fact that the other heirs intervened later through a different attorney, as they had a legal right to do, make the combined attack an improper one. The Court will not inquire into a litigant's motives when deciding concerning its jurisdiction, provided no improper act is done in order to confer jurisdiction. Re Metropolitan Railway Receivership, 208 U. S. 90, 110, 111, 28 S. Ct. 219, 52 L. Ed. 403; Black & White Taxicab Co., v. Brown & Hellow Taxicab Co., 276 U. S. 518, 524, 525, 48 S. Ct. 404, 72 L. Ed. 681, 57 A. L. R. 426. Such intervention may defeat jurisdiction on other grounds, as hereinafter pointed out, but not because of collusion."

In the State courts the rule is similar. For example, in a recent New York case, *E. B. Latham & Co.* v. *May-*

*flower Industries, Inc.,* 278 App. Div. 90, 103 N. Y. 2d 279, it was held at 282-283 of the Supp. Rep.:

> "Aside from the fact that plaintiff is asking our court to enjoin Mayflower, a New Jersey corporation, and Morris S. Segal, a New Jersey resident, from prosecuting in the New Jersey court an action against Thor, an Illinois corporation qualified to do business in New Jersey, and Teldisco, Inc., a New Jersey corporation, a suit in which plaintiff is not a litigant, we think that the complaint insofar as it seeks injunctive relief is insufficient. There is no allegation in the pleading that the New Jersey action was instituted in bad faith or that it was motivated by fraud or in an attempt to evade the law or public policy of this state. *The mere averment that appellants conspired to have Mayflower bring the action in New Jersey does not suggest any wrongful purpose.*" (emphasis supplied.)

In *Paramount Pictures* v. *Blumenthal,* 256 App. Div. 756, 11 N. Y. Supp. 2d 768, the Court at page 771 said:

> "A litigant may select the forum in which to ask for relief. The motive for such selection is not ordinarily open to scrutiny. The litigant may believe that he will be enabled to secure some advantage which he would not have if he brought his suit in the forum of his adversary, and this alone is not a ground for interfering with the generally recognized right to sue in any court having jurisdiction of the cause of action and competent to afford relief."

In *Re Metropolitan Street Railway Receivership,* 208 U. S. 90 (1908), complainants and defendants had arranged that suit should be brought in the Federal Court and that

the averments of the bill should be admitted by the answer. The Court held (p. 110):

> "In this case we can find no evidence of collusion, and the Circuit Court found there was none. It does appear that the parties to the suit desired that the administration of the railway affairs should be taken in hand by the Circuit Court of the United States, and to that end, when the suit was brought, the defendant admitted the averments in the bill and united in the request for the appointment of receivers. This fact is stated by the Circuit Judge; but there is no claim made that the averments in the bill were untrue, or that the debts, named in the bill as owing to the complainants, did not in fact exist; nor is there any question made as to the citizenship of the complainants, and there is not the slightest evidence of any fraud practiced for the purpose of thereby creating a case to give jurisdiction to the Federal court. That the parties preferred to take the subject matter of the litigation into the Federal courts, instead of proceeding in one of the courts of the State, is not wrongful. So long as no improper act was done by which the jurisdiction of the Federal court attached, the motive for bringing the suit there is unimportant. *Dickerman* v. *Northern Trust Co.,* 176 U. S. 181, 190; *South Dakota* v. *North Carolina,* 192 U. S. 286, 311; *Blair* v. *City of Chicago,* 201 U. S. 400, 448; *Smithers* v. *Smith,* 204 U. S. 632, 644."

**Moot Cases; Academic Questions.**

> "* * * It is elementary that the Court is not bound to determine questions which have become academic." *Ford Motor Co.* v. *National Labor Relations Board,* 305 U. S. 364, 83 L. ed. 221 (1939).

And in *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, the Supreme Court held, at page 116:

> " * * * Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly * * *."

In a *per curiam* decision the Supreme Court of the United States, in *St. Pierre* v. *United States*, 319 U. S. 41 at page 42 held:

> " * * * We are of the opinion that the case is moot because, after petitioner's service of his sentence and its expiration, there was no longer a subject matter on which the judgment of this court could operate. A federal court is without power to decide moot questions or give advisory opinions which cannot affect the rights of the litigants in the case before it. United States v. Alaska S. S. Co., 253 U. S. 113, 115-16 and at cases cited; United States v. Hamburg-American Co., 239 U. S. 466, 475-77. * * * "

No matter how a Court learns of an action's mootness it becomes its duty to ascertain the facts in its own interest as well as in the public's interest. In *Puget Sound Power & Light Co.* v. *City of Seattle*, 271 Fed. 958 (1921), the Court at page 963 held:

> "There doubtless is a question as to the propriety of considering the showing made by the affidavit on a motion to dismiss the bill; but, if the cause has become entirely moot by the payment of the installment of interest due March 1st, *in the interests of the public and the court, it would be the latter's duty to consider such a question at any stage of the proceeding, however presented or suggested, and, if it is certain that only a moot question remains, to*

*dismiss the suit* in order to devote the time and effort which would be required for its consideration to other public business." (emphasis supplied.)

## Statement of Issue Preliminary to Argument

In his Opening Brief (hereinafter, sometimes "Op. Br.") Mr. Reich at page 11 enumerates eight instances wherein the "District Court erred":

The Castlemans and Feuerman in the course of their brief will attempt to demonstrate not only the entire correctness of Judge Ben Harrison's decision and judgment but also will attempt, simultaneously, to demonstrate the lack of substance in the said alleged "errors". To achieve this objective and at the same time avoid a formalistic "one-point, one-answer" type of brief the Castlemans will make the direct and realistic approach.

Statistically, both the Record and the Opening Brief are predominantly concerned with lawyer's fees. For example the Opening Brief devotes 13 out of 54 pages to the topic of lawyer's fees (or 22% thereof); and the Record similarly devotes at least 105 out of 389 pages (or 26% thereof) to the same subject. Moreover, said Opening Brief concludes with the prayer for a hearing on two "motions (2) for attorney's fees and costs".

Consequently, the Castlemans and Feuerman respectfully submit, directly and realistically, that the true issue on this appeal is attorney's fees. They submit that the issue may be stated in the form of the following question:

> "Did Judge Harrison (a) err in dismissing the action below, and (b) abuse his discretion in denying fees to Mr. Reich therein, while (c) relegating him to a different arena for his costs and fees, if any?"

## ARGUMENT

### I

**Judge Harrison correctly dismissed the action with prejudice on the motion of RKO, supported by the "Relevant Documents From the Nevada and Delaware Courts".**

**Said documents, consisting in part, of unreversed judgments of the courts of Nevada and Delaware compelled the granting of the motion to dismiss said action under the Full Faith and Credit Clause of the Constitution; by reason of *res judicata,* under the Nevada judgment, and, by reason of mootness, under the Delaware judgment.**

**The Nevada and Delaware judgments may not be collaterally attacked in California.**

Judge Harrison bottomed his decision to dismiss the action below on "the occurrence of two events since the institution of" the action below (R. 356).

The first "event" was the sale of all of the assets of RKO Pictures Corp., including all the causes of action against all persons including Howard R. Hughes (R. 356, 195, 324); the detailed history of said transaction is to be found in *Schiff* v. *RKO Pictures Corp.,* 104 A. 2d 267 (R. 356). This litigation arose when an injunction against the consummation of said sale was sought by RKO shareholders who charged that the price was inadequate. Judgment on the merits in favor of RKO was duly entered in March 1954 (R. 193-194). Thereafter said sale was "fully and finally consummated" (R. 232).

That this acquisition would serve to "by-pass the impending derivative waste actions against (Hughes) * * *

does not condemn the transaction," (104 A. 2d 267 at 281) held the Chancellor of Delaware.

Thereby the action below was rendered moot and so Judge Harrison held (R. 356).

Where a cause of action between the parties has ceased to exist or where there is no actual controversy involving real and substantial rights between the parties to the record the case should be dismissed.

> *Little* v. *Bowers,* 134 U. S. 547, 33 L. ed. 1016;
> *San Mateo County* v. *Southern Pac. R. R.,* 116 U. S. 138, 29 L. ed. 589;
> *California* v. *San Pablo & TR Co.,* 149 U. S. 308, 37 L. ed. 747.

The courts deal with concrete legal issues presented in actual cases, not with abstractions.

> *U. S.* v. *Appalachian Elec. Power Co.,* 311 U. S. 377, 85 L. ed. 243.

In *Brownlow* v. *Schwartz,* 261 U. S. 216, 67 L. ed. 620, the Court had before it an applicant who had been refused a building permit for which she sued. Between the allowance of the writ of error and the hearing by the Court she sold her property. Calling the case moot the Court wrote:

> "It thus appears that there is now no actual controversy between the parties—no issue on the merits which this court can properly decide. *The case has become moot for two reasons*: * * * (2) because, the first reason aside, petitioner no longer has any interest in the building, and therefore has no basis for maintaining the action.
>
> "This court will not proceed to a determination when its judgment would be wholly ineffectual for want of a subject matter on which it could operate. * * * " (emphasis supplied.)

In the instant case the sale by RKO of all of its assets was fully and finally consummated. It (RKO) "therefore has no basis for maintaining the action." (*Brownlow* v. *Schwartz, supra*). Consequently, no shareholder of RKO can maintain the action. (*Koster* v. *Lumbermans' Mutual Casualty Co., supra;* Rule 23(a) and (b) .

In *Doremus* v. *Board of Education,* 342 U. S. 429, 96 L. ed. 475 (1952) a state statute involving the reading of Bible verses in a public school was attacked by the parent of a pupil who had graduated before the appeal from State's highest court was taken. In that situation the Court said at page 479:

> "Obviously no decision we could render now would protect any rights she may once have had, and this Court does not sit to decide arguments after the events have put them to rest. United States v. Alaska S. S. Co., 253 U. S. 113, 116."

With no right of action in RKO and none in any of its shareholders there was no reason for Judge Harrison to sit to decide incidental questions such as fees. In *Wagner* v. *Boggess Coal & Supply Co.,* 94 N. E. 2d 64, 66, where a contention to the contrary was made, the Court held:

> "It is contended that there remains a question as to the determination of costs. In Vol. 1, C. J. S., Actions, Sec. 17, p. 1015, it is stated that: 'Jurisdiction will not be retained merely to determine incidental questions such as costs.' In Miner v. Witt, supra, * * * holds ' * * * and the determination of questions presented by the record would, so far as this case is concerned: *affect nothing but the question of costs. There is nothing left but a moot case*'." (emphasis supplied.)

The second "event" was that "action involving the same issues * * * has gone to judgment on all of these

issues." And, "That judgment must be given the effect of *res judicata* by this Court".

The relevant certified copies of the Nevada action and judgment were before Judge Harrison (R. 194). The Findings of Fact and Conclusions of Law (R. 223-225) took cognizance of the raising of the issue of jurisdiction in the Nevada Court. That issue was resolved in favor of jurisdiction, expressly and explicitly, by the Nevada Court. Such a finding on that questioned issue rendered it invulnerable to collateral attack.

In *Rippberger* v. *A. C. Allyn*, 113 F. 2d 332, the Court had before it the same type of question—of collateral attack on a judgment where there was a decision in favor of jurisdiction.

Both phases of the question were taken up and squarely answered thus, at page 333:

> "The appellant concedes, as he necessarily must on the authorities, that a *decision in favor of jurisdiction is res judicata and invulnerable to collateral attack,* even though the ground on which the decision has rested has subsequently been overruled. (citing cases) * * * A court has power to determine whether or not it has jurisdiction of the subject matter of a suit and of the parties thereto. As Mr. Justice Brandeis remarked in American Surety Company v. Baldwin, supra, 'The principles of res judicata apply to questions of jurisdiction as well as to other issues'." (emphasis supplied.)

Since the action below was a minority stockholder's derivative action "any judgment in such an action—the corporation being a party—binds all stockholders." In *Grant* v. *Greene Consol. Copper Co.*, 154 N. Y. Supp. 596, at 603:

> "The plaintiffs contend that they are not bound by a decree in the action of any other stockholder,

> regardless of whether the issues were or were not identical with those in the present action. Assuming that the corporation was a party to such other action (as it necessarily was), there can be no doubt that plaintiff is bound the same as if he had himself been plaintiff. In other words, plaintiff is bound by a judgment upon a similar cause of action in favor of a stockholder, whether the action purported to be brought in behalf of all other stockholders or not, the same as he would be bound by a judgment on similar issues against the corporation itself. *The stockholders' action being a derivative one,* no stockholder has the right to sue for himself alone; his action is necessarily representative whether he calls it so or not, and *any judgment in such an action—the corporation being a party—binds all stockholders.* Alexander v. Donohoe, 143 N. Y. 203, 38 N. E. 263; Brinckerhoff v. Bostwick, supra; Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; Dana v. Morgan (D. C.) 219 Fed. 313; Willoughby v. Chicago Junction Ry. et al., 50 N. J. Eq. 656, 25 Atl. 277." (emphasis supplied.)

Mr. Reich's collateral attack on the Nevada judgment takes the form of an affidavit "In opposition to Motion to Dismiss" (R. 242). In that affidavit, however, Mr. Reich makes the following statements:

> "It is true that the complaint in the Nevada action and the amended complaint subsequently filed herein embraced the identical causes of action set forth in this action * * * " (R. 253).

> "I do not doubt that the motion to dismiss in Nevada was made and notices served as Mr. McDonald states * * * " (R. 255).

Mr. McDonald had also stated (and it is the fact) in his paragraph "3" as to which Mr. Reich made the above admission as to identity of complaints that it was "the identical plaintiffs herein, Eli B. Castleman, et al.," who had instituted said suit in Nevada.

Consequently, it appears either by proof, admission or concession that all the elements precluding collateral attack are present, to wit, identity of parties, identity of issues, jurisdiction over parties and jurisdiction over subject matter. In such a posture the Nevada judgment is invulnerable to collateral attack in California (or in any other state).

In *Turner* v. *Alton Banking & Trust Co.*, 181 F. 2 899 (1950) the bank sued upon an Illinois judgment in a federal court in Missouri. There was a suggestion of lack of jurisdiction in the Illinois court. In sustaining the finality and conclusiveness of the Illinois judgment the Eighth Circuit at page 905 held:

> "The judgment of the Illinois court is final and conclusive in all courts. It cannot be attacked collaterally in the federal court in Missouri. The Full Faith and Credit Clause of the Constitution, Art. IV, Sec. 1, has established 'throughout the federal system the salutary principle of the common law that a litigation once pursued to a judgment shall be as conclusive of the rights of the parties in every other court (federal as well as state) as in that where the judgment was rendered'. (citing cases). The place to have assailed the validity of the Illinois judgment was in the Illinois court. (citing cases).
>
> "Due process does not require notice where rights are established in conformity with state law. (citing cases)"

Mr. Reich's collateral attack on the *Delaware* judgment is included in the same affidavit (R. 242 at R. 260). How-

ever, therein Mr. Reich does " * * * not question the facts as alleged by Mr. McDonald * * *".

These are the facts which are not questioned:

1. On February 16, 1954 Schiff *et al.,* RKO shareholders filed Civil Action 491 (in Delaware Chancery Court) to enjoin the sale of RKO's assets to Hughes on the ground of inadequacy of price;

2. RKO filed its answer February 18, 1954 and the case was tried on the merits beginning March 8, 1954;

3. On March 26, 1954 the Chancellor handed down a 34 page opinion holding plaintiffs not to be entitled to the relief sought; and

4. Judgment on the merits in favor of RKO was duly entered (R. 193-194; certified copies of the relevant documents were before the Court below).

On the basis of *Grant* v. *Greene Consolidated Copper Co., supra,* and upon all the other cases therein cited the judgment in the Delaware action "binds all stockholders".

Moreover, by reason of the doctrines enunciated in *Rippberger* v. *A. C. Allyn* and *Turner* v. *Alton Banking & Trust Co., supra,* the Delaware judgment is invulnerable to collateral attack in California (or in any other state).

Finally and conclusively, there is the most recent case of *Stella, etc.* v. *Kaiser et al.,* 218 F. 2d 64 (advance sheets, Feb. 28, 1955, #1) which embraces all of the aspects inherent in the disposition of minority stockholder actions.

In the opening words of Chief Judge Clark of the Second Circuit:

> "This appeal concerns the effect as res judicata and bar of a decree of settlement entered by a federal court pursuant to F. R. C. P., 23(c), and of the releases executed thereunder."

After reciting the procedural steps preceding the entry of the judgment (in Michigan) reference is made to the attempted resumption by this plaintiff of his activities in his New York action. The Michigan judgment thereupon was successfully pleaded in bar below. A reversal of the summary judgment was sought. In sustaining the judgment Judge Clark, at page 65, continued:

> "There is no doubt that this claim was one of those compromised and settled by the Michigan decree (see Pergament v. Frazer, supra, D. C. E. D., Mich., 93 F. Supp., 13, 33-35), Plaintiff was an active litigant in the proceedings there and is bound under the principles of res judicata at least with respect to those defendants who were parties of record in Michigan (Baldwin v. Iowa State Traveling Men's Ass'n., 283 U. S. 522). Even without his active participation Stella would have been bound by the Michigan court's action, since it was a conclusive adjudication of a 'true' class action (Hansberry v. Lee, 311 U. S. 32, 132 A. L. R., 741; 3 Moore's Federal Practice, par. 23.11, 2d ed., 1947; McLaughlin, Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit, 46 Yale L. J., 421, 424), and since, moreover, there was adequacy of notice and representation as found by the Sixth Circuit (Masterson v. Pergament, sup, 6 Cir. 203 F. 2d, 315, 330; see Dickinson v. Burnham, 2 Cir., 197 F. 2d, 973, certiorari denied 344 U. S. 875, and proposed Rule 23(d) in Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, May, 1954, pages 15-17, discussed in Wright, Amendments to the Federal Rules; The Function of a Continuing Rules Committee, 7 Vand. L. Rev., 521, 439-540).
>
> *Plaintiff asserts, however, that the settlement itself was procured by fraud and that the Michigan decree*

> *is subject to attack for failure to decide this issue. But in this he is in error, for the fraud issue was in fact disposed of adversely to him by the Court of Appeals* (Masterson v. Pergament, supra, 6 Cir., 203 F., 2d, 315, 330-331). *Since this issue was repeatedly raised, it cannot now be made the basis for collateral attack* (De Bobula v. Goss, D. C. Cir., 193 F., 2d, 35)." (emphasis supplied.)

So, here, is the Nevada judgment invulnerable to collateral attack in California.

## II

**Judge Harrison did *not* abuse his discretion when he denied fees to Mr. Reich, by reason of the Nevada judgment, or otherwise, as a matter of discretion, and relegated him to a different arena (where he presently is).**

In "Law and the Modern Mind" by (now, Circuit Judge) Jerome Frank, there appears on the unnumbered pre-introductory page, without citation, the following quotation attributed to O. W. Holmes:

> "General propositions do not decide concrete cases."

Neither can the instant case be decided on general propositions. In the 13 pages devoted by Mr. Reich to the topic of lawyers' fees in stockholder's suits we find an abundance of "general propositions" with which one can hardly quarrel, but when they are related to the 105 pages of the record, *i.e.*, to the "concrete case", the enduring wisdom of Justice Holmes' comment is newly appreciated.

Before turning to any of the "general propositions" whether quoted by Mr. Reich or, *infra*, by the Castlemans

it would be well to do what this Court recently did in *Western Pacific R. Corp. et al.*, v. *Western Pacific R. Co. et al.*, 206 F. 2d 495. In that case this Court sensed the presentation of an innuendo which was coupled with the Robin Hood philosophy that undeserved riches should be divided with the poor. Dragging it into the light, this Court in footnote #7 at page 498 wrote, in part:

> "Lurking in the background of this case is a specious element which has no proper place in the decision but which when injected by innuendo casts its shadow across the record. * * * "

More than the specious element of the kind referred to by this Court is present. The Robin Hood philosophy, complete with references to the "poor and little people" (R. 377) and to the fees of New York counsel, is expectedly there (R. 282, 292). There is also the anticipated reference to " * * * Mr. Hughes' power and influence" and to the fact that people " * * * are in fear of him * * * " (R. 294). (Though, paradoxically, Mr. Hughes apparently was in fear of Mr. Reich (R. 291).

One genuinely "specious element" *here* is the fallacious logical doctrine expressed in the phrase *post hoc ergo propter hoc* (R. 291, 341).

There may be reported cases of applications for fees in stockholder actions (*infra*) based on the "but for—" theory of causation. In those cases, however, each claimant has, at least, postulated some direct, necessary and causal connection between his activities and the result.

Mr. Reich in his bid for fees herein, however, goes beyond any logically or legally permissible bounds (R. 291). His paragraphs "19" and "20" do not use the words "but for" although in "19" he is saying that the California action was *an* "inducing factor" and in "20" saying that he need *not* claim that *he* was the "*sole* inducing force".

This is outright tautology. Then in the very same paragraph he departs not only from fact but also from logic and postulates, in purest "post hoc ergo propter hoc"—style, thus:

> "* * * It is enough to prove that the corporations benefited to the extent of $12,000,000 or even $2,000,000, and that I rendered legal services in connection with the various cases (stet) which led to the compromise. * * *"

There is no case cited by Mr. Reich nor any known to the Castlemans which supports the proposition expressed by Mr. Reich in his fee application. On the other hand in *Thomas* v. *Peyer*, 118 F. 2d 369 the Court had occasion to pass upon the invocation of the "but for"—rule by a fee applicant. There are several points of similarity to the instant case which warrant the quotation therefrom of the following two paragraphs at page 371:

> "* * * Notwithstanding the later suit was successful and theirs was dismissed, appellants assert that it was the filing of their suit which caused the plaintiffs in the second one to rush into court in order to secure control of the litigation and prevent them and their client from doing so. Consequently, it is claimed, but for the filing of the first, the second would not have been commenced and therefore the benefits which accrued from it must be attributed to their action in filing the first one.
>
> *The argument amounts to an effort to apply in the present circumstances the 'but for' rule of causation, which has been applied in others but rarely and dubiously.* Except as to facts which have been adjudicated in previous phases of this litigation, we find nothing in the record to show that the contention is based on anything more substantial than the time sequence in the commencement of the two pro-

> ceedings. That in itself, of course, is hardly probative that filing the first induced filing of the second suit. To the contrary, both the record and appellants' argument show that the second one was planned long before appellants filed the first one. This is implicit in their charge that the later suit was but a step in the alleged conspiracy to defraud. In view of this, the conclusion is equally tenable, though we do not draw it, that appellants' suit was begun in order to anticipate and defeat the other one." (emphasis supplied.)

Another "specious element" is the one reflected in Mr. Reich's insinuation about efforts to *evade* payment of counsel fees (Op. Br. 46). The short answer to this "specious" insinuation is to be found in the affidavit of Mr. Reich himself who swears: "The fact is that I received a notice of motion inviting me to come to Las Vegas and make application for fees" (R. 251). To talk of evasion in such a circumstance is indeed specious. The more so, when coupled with this statement from his Opening Brief, page 49 "In the third place *the Nevada Court awarded fees to the plaintiffs for all counsel, including Reich.*"

Mr. Reich equivocates as to the fee situation as he does as to his discharge. From Paragraph 7 of the Final Order of the Nevada Court (Op. Br. 49) Mr. Reich would deduce that somehow his fees had been passed upon and awarded. If this Final Order is operative as to Paragraph 7 then, consistently, it must be operative as to Paragraph 10 (R. 239). *There* is to be found the direct judicial finding by the Nevada Court that excludes Mr. Reich as a person who had conferred any benefit on RKO or who had rendered compensable services to it or its shareholders.

The proceedings leading to the making and entry of the Final Order in Nevada were neither novel nor unusual. In *Waterman Corp.* v. *Johnston,* 122 N. Y. Supp. (2) 695.

a similar procedure was followed, with judicial appropriation of a total sum "for allocation to the various applicants". The similarity encompassed ruling on fees for out-of-town counsel. At page 702 Mr. Justice Eder held:

> "*The fund here* to be allocated *for the services* rendered *by counsel in other jurisdictions* in relation to or *in connection with* this action *is under the control of this Court,* and it is its view that compensation should be awarded and paid to those who in the opinion of the court merit it irrespective of the fact that the services were rendered by the applicants in another jurisdiction or before a court in another jurisdiction." (emphasis supplied.)

Assuming, *arguendo,* that Mr. Reich did *not* receive notice to come in to Nevada and establish his right to fees he would still be bound under *Mullane* v. *Central Hanover B & T Co.,* 339 U. S. 306, 94 L. ed. 865.

Similar instances of judicial disposition in one jurisdiction of fees for services rendered in other jurisdictions are to be found in:

> *Winkleman* v. *General Motors,* 48 F. Supp. 504 (S. D. N. Y., 1942);
> *Diamond* v. *Davis,* 62 N. Y. S. 2d 175 (Sup. Ct., N. Y. 1945).

In each of these cases an award was made for services rendered in another case, in another court. In the first a federal court made an award to counsel in a "stayed" state court case and in the *Diamond* case a state court made an award to counsel who had been stayed in a federal court case. Both of these cases were stockholder derivative actions.

And so we come to the time, some months after Mr. Reich's rejection of the opportunity to apply for fees in

Nevada that he applies to the California Court for Fees (R. 264, 284).

Judge Harrison had at least 20 contacts with the action (Index, R. iii, iv). He saw, heard and observed all counsel some of the times. He had voluminous affidavits, exhibits and papers from all of the parties (R. 381-384).

Whereas the printed Record, statistically, is concerned 26% with fees, if the unprinted papers were added the percentage would most likely double.

Much of the record before Judge Harrison reflects the termination of the attorney-client relationship with Mr. Reich and the dispute as to its consequences as a matter of fact and of law (R. 367, 371).

Judge Harrison at that time had before him the papers in the Nevada proceedings (R. 194). He also had before him the record of the Delaware action. He had the entire record to date plus Mr. Reich's fee applications and the opposing affidavit of Mr. Kipnis (R. 318).

His "Memorandum Granting Motion to Dismiss" (R. 356) reflects the careful consideration of all of the aspects of the issues involved in RKO's motion to dismiss with prejudice, which he, as an experienced jurist, brought to bear on the matter.

As an experienced jurist, it can be assumed that Judge Harrison was familiar with the doctrines expressed in the cases cited below.

In *Thomas* v. *Thomas,* 34 N. Y. Supp. 2d 320 (1942) at 323 it was held:

> "No special formality is required to effect the discharge of the attorney and the termination of the relationship; any act of the client indicating an unmistakable purpose to sever relations is enough and

> there can be no further legal continuance in the case by the discharged attorney or valid appearance for or representations of the client. Ryan v. Martin, 18 Wis. 672; In re Shafer's Estate, 39 Pa. Super. 384."

Across the continent there is similar authority. In *re Mueseler's Estate,* 220 P. (2nd, 18 (1950) (Dist. Ct. of App., Sec. Dist. Div. 3, Calif.) that Court at page 20, held:

> "The written dismissal of the attorneys ended their authority. See 3 Col. Jur. 628, 636."

As Judge Harrison and this Court well knows, a "client" may discharge an attorney at any time, with or without cause, whether there is a contract of retainer or not, and whether the fee arrangement is contingent or fixed.

In *Crowley* v. *Wolf,* 281 N. Y. 59 (1939) at page 65, Judge Hubbs wrote:

> "Where an attorney is hired on a contract, his payment to be a contingent fee, the client has the right to dismiss the attorney any time before the contract by its terms is to expire, and is not liable for the contract price. * * * Where the contract is extinguished by dismissal and not by the expiration of the term named in the contract, the client is liable on a quantum meruit unless the dismissal was justified. (citing cases). *If a discharge is justified there can be no recovery on quantum meruit.* Fletcher v. Kellogg, 55 App. D. C. 351, 6 F 2d, 476, 40 A. L. R. 19525; Holmes v. Evans, 129 N. Y. 140, 29 N. E. 233." (emphasis supplied.)

Mr. Reich's equivocation to the contrary notwithstanding, he was discharged for cause (R. 327, 330) on May 7, 1953.

The consequence of such a termination of a relationship is, "no compensation". *Bloom* v. *Irving Trust Co.*, 272 N. Y. Supp. 637, where at page 640, the late Mr. Justice Shientag wrote:

> "*Where an attorney* has been retained on the basis of a fixed or contingent fee, and *is discharged for cause, he may not recover any compensation at all.* The contract is an entire one, and, as in any other contract, the attorney must show proper performance in accordance with his retainer before he is entitled to compensation. In re Badger, 9 F. (2d) 560 (C. C. A., 2d Circuit)." (emphasis supplied.)

And in *Re Badger,* 9 F. (2) 560, justifiable cause is again shown to preclude compensation. The rule is there stated thus:

> "The rule is that, where an attorney has been retained on a specific contract and has been discharged for a justifiable cause, he may not recover compensation either in an action upon contract or upon a quantum meruit basis."

As we see it, after Judge Harrison had determined to dismiss the action below, his judicial supervision of the case was over. The only reason why Judge Harrison had to make any ruling on the matter of counsel fees stems from the motions made by Mr. Reich for an award of fees to himself in the California action.

The jurisdiction of Judge Harrison to make an award of fees to Mr. Reich was called into question by the Castlemans (R. 341) and Judge Harrison was urged that even if he did have jurisdiction he do not exercise his discretion in favor of Mr. Reich (R. 341). Having made his deliberate choice as between the Nevada Court and the California Court, Mr. Reich is bound thereby:

> "The fixing of allowances has been called 'the most thankless and delicate task in all of the problems of judicial reorganization,' Frank, Epithetical Jurisprudence and the Work of the Securities and Exchange Commission in the Administration of Chapter X of the Bankruptcy Act, 18 N. Y. U. L. Q. Rev. 317, 349-50, 1941, and 'one of the most disagreeable and perplexing tasks which falls to the lot of a District Judge.' Silver v. Scullin Steel Co., 8 Cir., 98 F. 2d 503, 506. Recognizing this, *and recognizing,* too, *the peculiar advantage which the district judge has* by virtue of his intimate knowledge of the whole history of the reorganization, *appellate judges can come to the conclusion that the lower court has exceeded its discretion in granting allowances only with the greatest reluctance*", * * * Finn v. Childs Co., 181 F. 2d 431.

To similar effect is *Roth* v. *Reich,* 164 F. 2nd 305.

A case which is even more analogous to the instant one, insofar as the fee application is concerned, is *Doggett* v. *Deauville Corporation,* 148 F. 2nd 881. In that case too (a) there was a dispute between counsel, (b) pendency in different courts of litigation and (c) the commencement of a plenary suit by an attorney against his client for fees. There the Circuit Court sustained the discretion of the Court below which remitted the whole matter of attorneys compensation under his contract to a plenary suit.

This Court may take judicial notice of its own files from which it will ascertain that there is pending in the State Court of New York a plenary suit by Mr. Reich against the Castlemans and their New York counsel (Louis Kipnis affidavit November 18, 1954).

Compensation, if any, for stockholders in derivative actions is made directly to the stockholder and not to his

attorney. 13 *Am. Jur.*, p. 514, Sec. 471; 13 *Fletcher Corporations,* Sec. 6045; *Holthusen* v. *Edward G. Budd Mfg. Co.,* 55 F. Supp. 945.

In a recent New York case the Supreme Court held, in discussing the same subject matter, in *Margaretten* v. *Horowitz,* 112 N. Y. Supp. (2) 24 at page 26:

> "The court is of the opinion that the underlying purpose of the allowance of counsel fees to plaintiffs in derivative actions is to be reimburse or indemnify plaintiff for reasonable counsel fees and expenses. Where, as here, the plaintiff takes the position that the counsel fee has been paid in full and the plaintiff does not join in the application for counsel fees, there is no basis for assessment against the defendants."

Moreover, said claim for allowances being personal to the Castlemans, Mr. Reich is precluded from any compensation in the California action particularly by reason of the Nevada judgment, in addition to the other reasons urged below.

In the light of the foregoing, this Court should not disturb the decision and judgment of Judge Harrison.

## III

**No error was committed by Judge Harrison in any aspect of his supervision of the action.**

Mr. Reich has made separate charges of error *vis-a-vis* Judge Harrison's supervision of the action below.

Some of these charges are insubstantial and the others, which called for the exercise of discretion, are beyond Appellate correction.

Insofar as "failing to grant" the motion for intervention is concerned, no error was committed by Judge Harrison since we have seen that intervention is not to be had simply for the asking and requires the exercise of discretion following a motion under Rule 24. There are two answers to Mr. Reich's charge. First, and equating "failing to grant" with outright denial, it was discretionary on Judge Harrison's part to grant or deny the motion and, absent an abuse of discretion, his ruling may not be disturbed.

As an experienced jurist of California, Judge Harrison was probably cognizant of this holding in *Mann* v. *Superior Court of Los Angeles County,* 127 Pac. (2d) 970, at 975:

> " * * * a stockholder's derivative suit, involving as it often does the possibility of financial returns, is not an open sesame for fees to counsel for interveners."

Moreover, Judge Harrison (and Judge McNamee) had been bombared with letters from Mr. Reich and others dealing tangentially with the case. Others, not parties to the action, were the recipients of carbon copies thereof (R. 112-113).

Second, Mr. Reich *pre-supposes* a "timely" applica-
on. As self-demonstrated below the motion was *not*
nely. No error was committed here.

* * *

No error was committed in failing to appoint a special
aster. The short and obvious answer to this charge of
ror is found in the single sentence of Rule 53(b):

> "A reference to a master shall be the exception and not the rule."

* * *

The remaining charges of error (other than those
parately treated in this brief) involve purely inter-
cutory or administrative aspects of Judge Harrison's
pervision of the action.

There was a wide area of discretion which Judge
arrison had. That he had exercised it correctly is borne
ut by the result herein.

The matter of putting "off-calendar" the motions of
e parties (not only those of Mr. Reich) was unquention-
bly a discretionary matter. As the late Mr. Justice
ardozo wrote in *Landis* v. *North American Company,*
99 U. S. 248, 81 L. ed. 153 (1936) at page 158:

> "Viewing the problem as one of power, and of power only, we find ourselves unable to assent to the suggestion that before proceedings in one suit may be stayed to abide the proceedings in another, the parties to the two causes must be shown to be the same and the issues identical * * * (citing cases). Apart, however, from any concession, *the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants.* How this can be done calls for the exercise of judgment, which

> must weigh competing interests and maintain an even balance * * *. Occasions may arise when it would be 'a scandal to the administration of justice' in the phrase of Jessel, M.R. (Amos v. Chadwick, L. R. 9 Ch. Div. 459, 462), if power to coordinate the business of the court efficiently and sensibly were lacking altogether." (emphasis supplied.)

Mr. Reich's reference to "abdication" of jurisdiction bears no relation to the facts below.

See also:

> *P. Beiersdorf & Co.* v. *McGohey,* 187 F. 2d 14; *Mottolese* v. *Kaufman,* 176 F. 2d 301.

In this instance, a fortiori, was Judge Harrison's discretion unassailable since no stay *order* was made. Moreover, *he did what Mr. Reich had been asking him to do all along.* For example:

> "I say only at this time that this action should not be dismissed and that *this Court should retain jurisdiction pending the outcome of the state action in Nevada*" (R. 55).
>
> "*The undersigned does not insist that this Court try the case*" (R. 85).
>
> "*I told Judge Harrison that I wanted the California action to be a stand-by action* * * *" (R. 142).
>
> "* * * I was willing to let Mr. Hughes' motion to quash to go by default on condition that the motion for security be opposed *and that the California action* * * * *would remain as a stand-by action* * * *" (R. 169).

Then, when Judge Harrison took the responsibility for continuing the motions until after the Nevada case was disposed of Mr. Reich said:

"Very well, your Honor, I accept that ruling" (R. 247).

In the context of the instant record it ill-becomes Mr. Reich to accuse Judge Harrison of "anxiety to put 'this case to sleep' for good * * * " (Op. Br. 21). It is of a piece with the gratuitous insult to the Nevada Court, which, Mr. Reich avers " * * * *had permitted itself to be used* to lure" him into Nevada " * * * so as to give some respectability to the defendants' (and plaintiff's New York counsel's) claim of res judicata" (R. 260).

* * *

The matter of reviving the motion to quash or to vacate the dismissal, to the extent demanded by Mr. Reich, was a strictly administrative or procedural exercise of discretion within the orbit of the *Landis* case, *supra.*

* * *

The matter of receiving affidavits from Messrs. Herzbrun, Silver, Kipnis or Mittelman was similarly within the *Landis* orbit.

* * *

Now, assuming without conceding that somewhere along the line in this "standby action", and in which a stipulation against further proceedings was outstanding (R. 37-38), that Judge Harrison committed an error. We look to the Rules for an answer. Rule 61, in part, reads as follows:

> "Harmless Error. *No error* * * * in any ruling or order or *in anything done or omitted by the court* * * * *is ground for* * * * *vacating,* modifying *or otherwise disturbing a judgment* or order, *unless* refusal to take such action appears to the court *inconsistent with substantial justice.* * * * " (emphasis supplied.)

Guided by that Rule no "error" complained of by Mr. Reich is ground for vacating, modifying or otherwise disturbing the judgment below.

Moreover, we are told in *Gillis* v. *Keystone Mutual Casualty Co.*, 172 F. 2, 826 at 830:

> " * * * This rule is intended for the guidance of the district court, but it should be heeded by the appellate court to make it effective. University City v. Home Fire & Marine Ins. Co., 8 Cir. 114 F. 2d 288."

With this Court similarly heeding the Rule no cognizable ground for vacating or modifying the judgment below is available.

## CONCLUSION

**No error having been committed below and no abuse of discretion having been shown the judgment of the District Court should be affirmed, in all respects, with costs.**

Respectfully submitted,

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*and*
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Louis Kipnis,
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May, 1955.